No. 02-857

IN THE

Supreme Court of the United States

HOUSEHOLD CREDIT SERVICES, INC.
AND MBNA AMERICA BANK, N.A.,
Petitioners,

v.

SHARON R. PFENNIG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Sixth Circuit improperly substituted its interpretation of the Truth in Lending Act for that of the Federal Reserve Board—the agency entrusted by Congress with responsibility for interpreting the statute—in invalidating an important provision of Regulation Z that excludes fees imposed "for exceeding a credit limit" (12 C.F.R. § 226.4(c)(2)) from the definition of "finance charge" (15 U.S.C. § 1604(a)).

LIST OF PARTIES AND RULE 29.6 STATEMENT

The caption of the case contains the names of all the parties to the proceedings before the court of appeals.

The parent company of petitioner Household Credit Services, Inc. is Household Finance Corporation, which is a wholly owned subsidiary of Household International, Inc. Household International, Inc., in turn, is a wholly owned subsidiary of HSBC Holdings plc.

The parent company of petitioner MBNA America Bank, N.A. is MBNA Corporation. Alliance Capital Management L.P. ("Alliance") and certain affiliates of Alliance (together with their parent corporations AXA Financial, Inc., AXA, and certain AXA affiliates) beneficially own more than 10% of MBNA Corporation's common stock.

No other publicly held company owns 10% or more of the stock of either petitioner.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 295 F.3d 522 (6th Cir. 2002). The opinion of the district court (Pet. App. A24-A29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2002, and a timely petition for rehearing was denied on September 3, 2002. The petition for a writ of certiorari was filed on December 2, 2002, and was granted on June 27, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the following provisions of the Truth in Lending Act:

§ 1604. Disclosure guidelines

(a) *Promulgation, contents, etc., of regulations*

The Board shall prescribe regulations to carry out the purposes of this subchapter. Except in the case of a mortgage referred to in section 1602(aa) of this title, these regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

15 U.S.C. § 1604(a).

§ 1605. Determination of finance charge

(a) *"Finance charge" defined*

Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.

15 U.S.C. § 1605(a).

Another section of the Truth in Lending Act, 15 U.S.C. § 1637, is reproduced in an Appendix to this brief.

This case also involves the following regulation issued by the Federal Reserve Board:

§ 226.4. Finance charge.

* * * *

(c) *Charges excluded from the finance charge.* The following charges are not finance charges:

* * * *

(2) Charges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence.

12 C.F.R. § 226.4(c)(2).

STATEMENT

A divided panel of the United States Court of Appeals for the Sixth Circuit invalidated an important, previously unquestioned, regulation issued in 1981 by the Board of Governors of the Federal Reserve System ("Board"). Under the regulation, when a creditor imposes a fee on a consumer for exceeding the credit limit, the fee should be disclosed, not as part of the "finance charge," but, rather, as an "other charge." In enacting the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, Congress delegated expansive authority to the Board to interpret the statute and issue such regulations. Under this Court's precedents, the Board's regulations implementing TILA are valid unless demonstrably irrational. *See Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980). Contrary to the high level of deference due, the court of appeals disregarded the Board's expertise, substituted its own interpretation of TILA, and held that the Board's regulation excluding over-limit fees from the finance charge "cannot stand." Pet. App. A12. The court's decision invalidating the Board's regulation is incorrect and should be reversed.

A. TILA And Regulation Z

1. Statutory background. Congress enacted TILA in 1968 "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ." 15 U.S.C. § 1601(a). TILA is a disclosure statute, not a restriction on the amounts that creditors may charge; it "provides for full disclosure of credit charges, rather than regulation of the terms and conditions under which credit may be extended." H.R. Rep. No. 90-1040 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1963. Congress determined that "such full disclosure would aid the consumer in deciding for himself the reasonableness of the credit charges imposed and further permit the consumer to 'comparison shop' for credit," thus "encourag[ing] a wiser and more judicious use of consumer credit." *Id.*

Neither state nor federal law requires that creditors follow a single model in framing the terms of their consumer credit offerings. Congress recognized that, as a result of the ensuing "complexity and variety, . . . credit transactions defy exhaustive regulation by a single statute." *Milhollin*, 444 U.S. at 559. Accordingly, "[t]o accomplish its desired objective, Congress determined to lay the structure of [TILA] broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation." *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 365 (1973). Congress directed the Board to "prescribe regulations to carry out the [statute's] purposes." 15 U.S.C. § 1604(a). TILA provides that "these regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate [TILA's] purposes . . . or to facilitate compliance therewith." *Id.* Pursuant to that delegation of authority, the Board promulgated a regulation, known as Regulation Z, that implements TILA. *See* 12 C.F.R. Part 226.

In 1980, Congress amended TILA through the Truth in Lending Simplification and Reform Act ("Simplification Act"), Pub. L. No. 96-221, Title VI, 94 Stat. 132, 180. Despite the success of the original TILA, Congress determined that "the interests of both consumers and creditors would be furthered by simplification and reform of the act." S. Rep. No. 96-73, at 2 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280, 281. Congress found that "disclosure forms given to consumers" often were "too lengthy and difficult to understand." *Id.* In addition, creditors "encountered increasing difficulty in keeping current with a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions." *Id.* Many creditors who "sincerely tried to comply with the act" nonetheless "found themselves in violation and subject to litigation" due to the statute's "increasing complexity and frequent changes." *Id.* Congress thus amended TILA "to provide the consumer with clearer credit information" and to

"make creditor compliance easier." *Id.*, 1980 U.S.C.C.A.N. at 280.

2. TILA's disclosure regime. Under TILA, credit card issuers ordinarily must disclose significant charges imposed as part of a credit plan either in the "finance charge" or as "other charges." TILA requires creditors to make such disclosures on three principal occasions: (i) in certain applications and solicitations, (ii) in initial disclosures before a credit plan is opened, and (iii) in periodic billing statements. *See* 15 U.S.C. § 1637. With regard to applications and solicitations, creditors must disclose, *inter alia*, the "annual percentage rate applicable to extensions of credit under such credit plan,"[1] as well as certain other charges that may be imposed, including "late fee[s]" and "[o]ver-the-limit fee[s]."[2] *Id.* § 1637(c)(1). With regard to initial disclosures, creditors must disclose, *inter alia*, the "conditions under which a finance charge may be imposed," the "method of determining the amount of the finance charge," the "periodic rates [that] may be used to compute the finance charge," and "other charges which may be imposed as part of the plan." *Id.* § 1637(a). Finally, with regard to periodic billing statements, creditors must disclose, *inter alia*, the "amount of any finance charge added to the account during the period," the "periodic rates [that] may be used to compute the finance charge," and, ordinarily, "the total finance charge expressed as an annual percentage rate." *Id.* § 1637(b).

TILA generally defines a "finance charge" as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or

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[1] The annual percentage rate is "the quotient (expressed as a percentage) of the total finance charge for the period to which it relates divided by the amount upon which the finance charge for that period is based, multiplied by the number of such periods in a year." 15 U.S.C. § 1606(a)(2).

[2] TILA requires that over-limit fees and late fees be disclosed "clearly and conspicuously" in applications and solicitations. 15 U.S.C. § 1637(c)(1)(B), (c)(4)(B).

indirectly by the creditor as an incident to the extension of credit." *Id.* § 1605(a). TILA provides examples of specific charges that must be included in the finance charge and other charges that may or must be excluded. *See id.* § 1605. TILA is silent on the precise question whether over-limit fees are to be included in the finance charge.

TILA subjects "any creditor who fails to comply with [its] requirement[s]" to civil liability for actual damages, statutory damages and reasonable attorney's fees and costs. 15 U.S.C. § 1640(a). The statute provides, however, that creditors who act "in good faith conformity with any rule, regulation, or interpretation thereof by the Board" are immune from civil liability, even if the rule, regulation or interpretation is later "amended, rescinded, or determined by judicial or other authority to be invalid for any reason." *Id.* § 1640(f).

3. The relevant provision of Regulation Z. In Regulation Z, the Board implemented TILA's general definition of "finance charge" by providing creditors with definitive examples of charges that should, and should not, be included. *See* 12 C.F.R. § 226.4.

Ever since TILA's enactment, there has been an important need for the Board's guidance regarding which specific fees and charges should be included in, and excluded from, the "finance charge." The Board explained the need for such definitive rules interpreting the term "finance charge" in a 1996 report requested by Congress:

> The finance charge does not include every cost associated with obtaining consumer credit, such as many charges paid in a real estate-secured loan. From the beginning of the discussion about the concept of "Truth in Lending" in the 1960s there has been considerable debate about which costs should be classified as finance charges for disclosure purposes. Over the years, a complex set of rules has attempted to define with precision which charges should or should not be considered finance charges. Despite these rules, ambiguities have persisted, and in recent years lenders have become increasingly concerned about litigation alleging incorrect categorization of these charges.

Board of the Governors of the Federal Reserve System, *Report to the Congress: Finance Charges for Consumer Credit Under the Truth in Lending Act* 1 (Apr. 1996).

In the original version of Regulation Z, § 226.4(c) excluded from the finance charge certain fees imposed in connection with a breach of the credit agreement by the consumer, such as charges for "late payment, delinquency, default, reinstatement, or other such occurrence." 34 Fed. Reg. 2002, 2004 (Feb. 11, 1969). Although the original regulation did not expressly address over-limit fees, the Board and its staff nevertheless interpreted the regulation as excluding such fees from the finance charge on the ground that over-limit fees were a type of delinquency or default charge. *See* Official Interpretive Letter FC-0142 (Fed. Reserve Bd. Jan. 9, 1978); Unofficial Staff Interpretation PI-1281 (Fed. Reserve Bd. Feb. 14, 1978).

Following enactment of the Simplification Act in 1980, the Board amended Regulation Z to provide creditors "with clearer, more understandable, and less burdensome rules." 45 Fed. Reg. 29702, 29702 (May 5, 1980). The Board specifically proposed to add to § 226.4(c) an express reference to over-limit fees, making clear that such fees should be excluded from the finance charge. *See id.* at 29735. The proposed revisions were exposed to two rounds of public comments. These "comments reflected strong support for the concept of simplification." 45 Fed. Reg. 80648, 80648 (Dec. 5, 1980). The Board stressed that its proposed revisions "substitute[], where possible, precise, easily-applied rules for principles that create ambiguity and require additional regulatory clarification." *Id.* In 1981, the Board issued a final rule incorporating its extensive revisions of Regulation Z. *See* 46 Fed. Reg. 20848 (Apr. 7, 1981). That final rule included the current language of 12 C.F.R. § 226.4(c)(2), a bright-line rule "exclud[ing] from the finance charge ... [c]harges for actual unanticipated late payment,

for exceeding a credit limit, or for delinquency, default, or a similar occurrence." 46 Fed. Reg. at 20894 (emphasis added).

Since the 1981 revision, the Board has amended Regulation Z approximately 20 times in response to statutory amendments, changes in banking practices, or other pertinent developments. *See, e.g.*, 66 Fed. Reg. 65604 (Dec. 20, 2001). For example, in 1989, the Board first amended Regulation Z to implement an amendment to TILA requiring disclosures in table format for certain applications and solicitations (the so-called "Schumer Box"). *See* 54 Fed. Reg. 13855 (Apr. 6, 1989) (implementing Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, 102 Stat. 2960). These Schumer Box regulations included new disclosure requirements for credit card over-limit fees. The Board has not at any time changed, or proposed to change, the § 226.4(c)(2) exclusion of over-limit fees from the definition of "finance charge."

Regulation Z today requires disclosures in (i) applications and solicitations, (ii) initial disclosures before a credit plan is opened, and (iii) periodic billing statements. *See* 12 C.F.R. §§ 226.5a, 226.6, 226.7. In each instance, Regulation Z requires creditors to disclose over-limit fees separately from the finance charge. *See id.* §§ 226.5a(b)(10) (applications and solicitations), 226.6(b) (initial disclosures), 226.7(h) (periodic statement); *see also id.* pt. 226, Supp. I (commentary to §§ 226.6(b), 226.7(h)).

B. Proceedings In The District Court

1. Respondent's complaint. Respondent Sharon Pfennig is a consumer who holds a credit card originally issued by an affiliate of petitioner Household Credit Services, Inc. and later acquired by petitioner MBNA America Bank, N.A. *See* Pet. App. A31-A32. Petitioners charged respondent an over-limit fee of $29 during certain months in which her balance exceeded the $2,000 credit limit applicable to her account. *See id.* at A33, A39. In accordance with Regulation Z, petitioners did not include this fee in the finance charge on respondent's periodic billing statement,

but did disclose the fee separately as an "other charge." *See id.* at A33, A39-A40.

In August 1999 respondent filed this action in the United States District Court for the Southern District of Ohio on behalf of a purported nationwide class of petitioners' cardholders. *See id.* at A33-A36. Her complaint alleged that petitioners "allowed [her] to make charges" that caused her to exceed her credit limit and then imposed an "over limit fee" for every month that her balance exceeded that limit. *Id.* at A39.[3] Without acknowledging the provision of Regulation Z that governed petitioners' disclosures of the over-limit fee—under which petitioners' disclosures were proper—respondent alleged that petitioners violated TILA by omitting the fee "from the finance charge calculation" on her periodic billing statement. *Id.* at A33. Respondent sought declaratory and injunctive relief as well as monetary damages. *See id.* at A40-A41.

2. The district court decision. Relying on Regulation Z's express exclusion of over-limit fees from the finance charge, petitioners moved to dismiss the complaint for failure to state a claim upon which relief can be granted. The district court granted petitioners' motion, holding that "in light of the plain language of Regulation Z, the 'over-limit fee' at issue in this case is not a finance charge" under TILA. *Id.* at A27.

The district court recognized that it must "give deference to the Federal Reserve Board's statutory interpretation of the term finance charge." *Id.* at A28. Applying the standard set forth by this Court in *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980), the court concluded that "Regulation Z's exclusion of the 'over limit fee' from the definition of 'finance charge' is rationally based." Pet. App. A28. The court explained:

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[3] These allegations are accepted as true because this case comes to the Court on petitioners' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

> Section 226.4(c)(2) excludes several categories of charges, all of which arise when the terms under which the credit was extended have been breached by the borrower. These categories include the making of unanticipated late payments or the exceeding of a credit limit. Further included in these categories are charges arising after delinquency or default. Each of these categories include charges for past credit extension events that were not agreed to by the parties. The lender agreed to loan and the borrower agreed to borrow under agreed upon terms which were "incident to the extension of credit," as that term is used in 15 U.S.C. § 1605(a). No such agreement was reached permitting unanticipated late payments, delinquency, or default. No such agreement was reached as to the borrower unilaterally exceeding the agreed upon credit limit. All of these post-credit extension occurrences are done in violation of the agreed upon terms upon which the credit was extended. Such charges are never imposed upon a borrower who simply follows the terms of the agreement. The Federal Reserve Board rationally determined that these charges, for acts amounting to breaches of the agreed upon credit extension, are not finance charges.

Id.

C. The Court Of Appeals Decision

A divided panel of the Sixth Circuit reversed in part and affirmed in part. The panel majority held that Regulation Z's exclusion of over-limit fees from the finance charge is invalid because it conflicts with TILA's general definition of finance charge. The court concluded, however, that petitioners are immune from monetary damages under TILA because they complied in good faith with Regulation Z.

1. The majority opinion. The Sixth Circuit conceded that "the fee at issue in this case was imposed for 'exceeding

a credit limit'" and that "Regulation Z expressly states that charges imposed for exceeding credit limits are excluded from the 'finance charge.'" Pet. App. A17. The court also acknowledged its obligation under this Court's decisions to give "deference . . . to the [Board's] interpretation of the Act as long as such interpretations are not irrational." *Id.* at A6. The Sixth Circuit nonetheless refused to defer to the Board's interpretation of TILA for two principal reasons.

First, the court of appeals stressed "that TILA, as a remedial statute, must be given a liberal interpretation in favor of consumers in order to protect them in credit transactions." *Id.* at A8-A9. Declining to acquiesce in the Board's expertise and judgment, the court concluded that "TILA's statutory goal of providing adequate disclosure in order that the consumer will knowledgeably be able to compare credit options" would best be served by including over-limit fees in the finance charge. *Id.* at A12.

Second, the court of appeals held that, applying a liberal interpretation, the over-limit fee imposed in this case necessarily falls "within the statutory definition of finance charge." *Id.* at A9. The court noted that "TILA defines a finance charge as the sum of 'all charges' paid by the person to whom credit is extended and assessed by the creditor 'as an incident to the extension of credit.'" *Id.* (emphasis omitted) (quoting 15 U.S.C. § 1605(a)). Based on respondent's allegation that petitioners "allowed" her to exceed her credit limit by accepting the charge that put her over the limit, the court concluded that the over-limit fee in this case was imposed "as incident to th[e] extension of credit" and thus was a finance charge under TILA. *Id.* at A13.

For these reasons, the court ruled that "Regulation Z's exclusion of over-limit fees . . . from the 'finance charge' conflicts with the express language of TILA" and that "the regulation [therefore] cannot stand." *Id.* at A12. Having rejected the Board's classification of over-limit fees, the court of appeals substituted a fact-dependent test of its own making. Under the Sixth Circuit's new test, an over-limit fee must be included in the finance charge if "the creditor *knowingly permits the credit card holder to exceed his or her*

credit limit and then imposes a fee incident to the extension of that credit." *Id.* at A15 n.5 (emphasis added).

The court of appeals nevertheless affirmed the dismissal of respondent's claim for damages, holding that "it is beyond cavil that [petitioners] complied with Regulation Z and pursuant to 15 U.S.C. § 1640(f) should be afforded immunity from civil damages." Pet. App. A18 n.6. As the court explained, "it is undisputed that the fee at issue in this case was imposed for 'exceeding a credit limit.'" *Id.* at A17. Based on these "undisputed facts," the court concluded that petitioners "are entitled to immunity from civil liability for failing to disclose [the fee] as part of the finance charge." *Id.* at A18.

2. The dissent. Chief Judge Edgar of the United States District Court for the Eastern District of Tennessee, sitting by designation, dissented. Observing that "[o]ver-limit fees are nowhere mentioned" in "the general statutory definition of finance charge," Pet. App. A20, Judge Edgar disagreed with the majority's conclusion that Regulation Z conflicts with TILA.

First and foremost, Judge Edgar explained, the majority had improperly substituted its own interpretation of TILA for that of the Board (*id.* at A22.):

> The majority's interpretation of § 1605(a) might well be a reasonable one; but so is that of the Federal Reserve Board. Certainly it cannot be said that the Federal Reserve's exclusion of over-limit charges from the finance charge in Regulation Z is demonstrably irrational. The Federal Reserve merely filled in a blank left by Congress in the TILA, and analogized over-limit charges to unanticipated late payments and charges for delinquency or default. These other charges are clearly not a part of the finance charge because they are, as the district court concluded, post extension of credit occurrences. The same can be reasonably said about over-limit fees.

Judge Edgar was also skeptical of the majority's assumptions about the operation of the credit card industry. He noted that

> [t]he majority's rationale is that an over-limit fee is "imposed incident to the extension of credit" because after [respondent] reached her credit limit, she in effect requested more credit by exceeding the limit; and by permitting her to exceed the limit and charging her a fee, [petitioners] imposed the fee "incident to the extension of credit."

Id. at A20-A21. As Judge Edgar observed, respondent's assertion "that a credit card issuer 'gets to make the decision as to whether or not [an over-limit] charge will be permitted to go through' may not, in all cases, be accurate." *Id.* at A21 (alteration in original). He explained: "From our personal experience we know that many merchants check credit cards on-line before accepting customer charges. However, this may not be true in all cases; and, of course, the TILA and Regulation Z apply to all consumer credit transactions, not just those of [respondent]." *Id.*

Finally, Judge Edgar criticized the majority for replacing Regulation Z's bright-line classification with a case-specific test that would lead to "lack of uniformity and confusion." *Id.* at A23 n.1. The majority's decision, he explained, "means that credit card issuers must only disclose an over-limit fee when they have been made aware that an over-limit charge is pending approval, and they then permit the charge to go through." *Id.* Under this test, "some card issuers may be required to disclose under some circumstances, while others may not." *Id.*

3. The request for rehearing. Petitioners sought panel rehearing and rehearing en banc. The Board, which learned of the case only after the court of appeals had issued its initial decision, filed an amicus brief that sought to explain its regulation. *See* Pet. App. A43-A53. The Board explained that its "rule excluding over-limit fees from the finance charge is based on the rational assumption that the fees are imposed when the consumer uses the credit plan in a manner

that violates the terms of the plan." *Id.* at A46. "Based on the rule, consumers can use uniform disclosures to compare the cost of credit card programs offered by different creditors that do not account for contingent costs that may be imposed under each plan for unanticipated events such as late payments or over-limit situations." *Id.*

In light of the Sixth Circuit's reliance on self-generated assumptions about standard credit card authorization processes, the Board also attempted to advise the court about credit industry practices that inform the regulation. The Board explained that the panel majority had erred by assuming that if a creditor processes a charge that results in an account exceeding its credit limit, then the creditor has in effect renegotiated the terms of the parties' credit agreement and knowingly agreed to extend additional credit to the cardholder in return for the price of the over-limit fee. *See id.* at A47-A48. Contrary to the court's assumption, the Board explained, standard credit card "authorization" systems do not provide creditors the ability to determine whether a particular charge will cause an account to exceed its credit limit:[4]

> First, credits to the consumer's account are not posted until the end of the day. Thus, for example, a transaction that appears to push the account balance over the credit limit at 4:00 p.m. may turn out to have no such effect when a payment reducing the account balance is posted later that day. Second, in many cases, instead of seeking

[4] These so-called "authorization" systems are arrangements between merchants and credit card companies, who "authorize" the merchant to submit a credit card charge to the credit card system for payment. With certain exceptions, if a merchant properly seeks and receives "authorization" for a charge, the credit card issuer may not subsequently refuse to pay the charge. The consumer is not a party to the "authorization." *See, e.g., United States* v. *Visa U.S.A. Inc.*, 163 F. Supp. 2d 322, 332 n.4 (S.D.N.Y.) (describing typical form of transaction in Visa and MasterCard systems), *judgment modified*, 183 F. Supp. 2d 613 (S.D.N.Y. 2001), *stay granted*, 2002 WL 638537 (S.D.N.Y. Feb. 7, 2002).

> authorization for the actual transaction amount, a merchant will send in a request for a nominal amount simply in order to determine whether the consumer has a "live" card. In such a case, the actual transaction may cause the account balance to exceed the credit limit even though the authorization request gave the issuer no notice of that possibility. Third, in some cases, such as hotel or car rental charges, merchants can "block" large amounts of credit on check-in to ensure that the charge will be authorized when the consumer checks out and pays, making an account look substantially closer to its credit limit than it in fact is.

Id. at A49-A50 (footnotes omitted). These and other uncertainties make it impossible for creditors to have precise, real-time knowledge that a particular charge will cause an account to exceed its credit limit.

As the Board further explained in its brief, "creditors generally do not deny authorization on the mere suspicion that a transaction would cause the account balance to exceed the consumer's credit limit." *Id.* at A50. Instead, creditors

> typically determine whether to impose [an over-limit] fee only at the end of the billing cycle, when it can be determined that all charges and credits to the account establish that the consumer is in fact over the credit limit, and when other factors, such as the consumer's payment history, the amount by which the limit is exceeded, and whether the limit has been exceeded in the past, for example, may be taken into account.

Id. For this reason, over-limit fees commonly are not imposed in connection with a specific charge but, instead, as a result of multiple factors related to the account's overall status. *See id.* at A50-A51.

In the Board's view, these credit card practices demonstrated that "authorization" of a charge that ultimately results in an account exceeding its credit limit does not signal the creditor's consent to the cardholder's

incurring debt beyond the credit limit. *See id.* at A50. On the contrary, creditors oppose such behavior and impose over-limit fees "to impose discipline on consumer credit usage." *Id.*; *see also id.* at A51 (noting that over-limit fees are "imposed to affect consumer behavior to comply with the requirements of a credit agreement"). Given these realities, the Board explained that its regulation rationally treats "the over-limit fee [similarly] to other charges—such as late fees—that are not finance charges because they are not incident to a particular extension of credit." *Id.* at A51. Instead, over-limit fees are imposed because the customer's incurring of debt exceeding the credit limit is an "act[] of default under the credit contract." *Id.* at A45.

The Sixth Circuit denied panel rehearing, but amended its opinion to add a footnote rejecting the Board's arguments. The court dismissed the Board's explanation of the reasons for its regulation and "the actual operation of the credit card industry" as facts that "were never raised below and are not in the record." *Id.* at A10 n.2. The full court later denied petitioners' request for rehearing en banc. *Id.* at A30.

SUMMARY OF ARGUMENT

The Sixth Circuit erroneously invalidated an important provision of Regulation Z that had been in effect for over two decades.

TILA does not address the precise question of whether over-limit fees should be included in the "finance charge" or disclosed separately as "other charges." In 1981, the Board filled this gap by amending Regulation Z to make clear that over-limit fees should not be included in the finance charge. This clear and easily applied rule furthered the goal of the Truth in Lending Simplification and Reform Act of 1980, which was to provide clearer credit information to consumers and make compliance easier for creditors.

TILA gives the Board unusually broad authority to make "such classifications ... as in the judgment of the Board are necessary or proper to effectuate the purposes of

[TILA]." 15 U.S.C. § 1604(a). In view of this expansive delegation of power, this Court has held that the Board's interpretations of TILA are "dispositive" unless "demonstrably irrational." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980). Thus, "absent some obvious repugnance to the statute, the Board's regulation implementing [TILA] should be accepted by the courts." *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 219 (1981). It cannot be said that the Board's regulation excluding over-limit fees from the finance charge is demonstrably irrational or obviously repugnant to TILA. The Board instead reasonably classified over-limit fees—like other fees imposed because a consumer violates the credit agreement—as other charges that must be disclosed separately.

Although it cited *Milhollin* and *Valencia*, the Sixth Circuit failed to accord the Board's regulation the broad deference that those cases require. To the contrary, the court of appeals rejected the Board's reasonable interpretation of TILA, substituting instead what the court believed to be "a liberal interpretation in favor of consumers." Pet. App. A8. In attempting to determine on its own which rule would best "protect [consumers] in credit transactions," *id.* at A8-A9, the Sixth Circuit improperly usurped the role that Congress assigned to the Board. Rather than interpret TILA's general language liberally, the court of appeals was required to defer to the Board's rational interpretation of the statute, as well as to the Board's expert judgment that consumers are better able to compare the costs of credit if over-limit fees are not included in the finance charge.

In holding that the over-limit fee in this case was imposed "as an incident to th[e] extension of credit," the Sixth Circuit also mistakenly assumed that by authorizing a transaction that causes an account to exceed the credit limit, a creditor in effect "renegotiate[s] the [credit] agreement." *Id.* at A13. As the Board explained, its regulation is rationally based on its knowledge of actual authorization processes used in the credit card industry. These point-of-sale authorization systems are not designed to, and general-

ly do not, enable creditors to determine whether a transaction will cause the consumer to go over the credit limit and incur an over-limit fee. *See id.* at A50. That the Sixth Circuit invalidated a long-standing regulation based on a misunderstanding of the actual operation of the credit card industry shows why courts should defer to the Board's views and not attempt to chart their own course to TILA's purposes.

ARGUMENT

I. The Federal Reserve Board Has The Power To Promulgate Regulations Rationally Interpreting The Truth In Lending Act.

As a general matter, a court considering the validity of an agency regulation interpreting a statute must undertake a two-step inquiry. If "Congress has directly spoken to the precise question at issue[,] ... the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). However, "if the statute is silent or ambiguous with respect to the specific issue," and the agency regulation "is based on a permissible construction of the statute," the court must defer to that regulation. *Id.* at 843. "The court need not conclude that the agency construction was the only one it permissibly could have adopted ..., or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. Rather, so long as the agency's construction of the statute is reasonable, the court must defer to the agency and "may not substitute its own construction of [the] statutory provision." *Id.* at 844. Here, the Board acted in the manner that commands the highest level of deference: formal notice-and-comment rulemaking. *See United States* v. *Mead Corp.*, 533 U.S. 218, 229-30 (2001).

In the TILA context, the Board's regulations are entitled to even greater deference than might be due under general administrative-law principles. Congress envisioned a special role for the Board in the implementation of TILA when it instructed the Board to "prescribe regulations to

carry out the purposes" of the statute. 15 U.S.C. § 1604(a). Congress authorized the Board broadly to promulgate regulations that contain "classifications, differentiations, or other provisions, ... adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." *Id.* In light of this expansive delegation of authority, as well as the Board's particular expertise in the technical and complex area of credit-related disclosures covered by TILA, this Court has held that, "absent some *obvious repugnance* to the statute, the Board's regulation[s] implementing [TILA] should be accepted by the courts." *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 219 (1981) (emphasis added).

The Court has emphasized the "high degree of deference" due the Board, holding in *Ford Motor Credit Co.* v. *Milhollin* that the Board's interpretations of TILA are "dispositive" unless "demonstrably irrational." 444 U.S. 555, 557, 565 (1980). While principles of administrative law require courts as a general matter to be "attentive[] to the views of the administrative entity appointed to apply and enforce a statute," the Court stated that such "deference is especially appropriate in the process of interpreting the Truth in Lending Act." *Id.* at 565. "Because of their complexity and variety, ... credit transactions defy exhaustive regulation by a single statute. Congress therefore delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit." *Id.* at 559-60.

In *Milhollin*, the Court identified several reasons why the Board's interpretations of TILA are entitled to a special level of deference. First, "acquiescence in administrative expertise is particularly apt under TILA because the Federal Reserve Board has played a pivotal role in setting [the statutory] machinery in motion." *Id.* at 566 (internal quotation omitted) (second alteration in original). The Court emphasized that "Congress delegated broad administrative lawmaking power to the Federal Reserve Board when it

framed TILA" and that "[t]he Act is best construed by those who gave it substance in promulgating regulations thereunder." *Id.*[5]

Second, the Court pointed to clear evidence of Congress's intent to vest broad policymaking power in the Board: "Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law. Because creditors need sure guidance through the 'highly technical' Truth in Lending Act, legislators have . . . acted to promote reliance upon Federal Reserve pronouncements." *Id.* (citation omitted). The Court noted that TILA's grant of immunity from damages for good-faith reliance on the Board's interpretations "signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative." *Id.* at 567-68. "Moreover, language in the legislative history evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." *Id.* at 568. The Court emphasized that judges "should honor that congressional choice" and "refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational." *Id.*

Third, the Court concluded that broad "deference to the Federal Reserve is compelled by necessity; a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views." *Id.* Fulfillment of TILA's goal of "meaningful disclosure" requires "striking the appropriate balance"

[5] *Milhollin* involved Board staff opinions interpreting TILA and Regulation Z. The degree of deference due to provisions of Regulation Z itself, promulgated after notice and public comments pursuant to the Administrative Procedure Act and delegation by Congress of "broad administrative lawmaking power" is at least as great. *See Mead Corp.*, 533 U.S. at 229-30; *Christensen* v. *Harris County*, 529 U.S. 576, 587-88 (2000).

between "complete disclosure" and "informational overload," an "empirical process that entails investigation into consumer psychology and that presupposes broad experience with credit practices." *Id.* at 568-69 (internal quotation marks and citation omitted). As the Court recognized, "[a]dministrative agencies are simply better suited than courts to engage in such a process." *Id.* at 569.[6]

II. The Truth In Lending Act Is Ambiguous Regarding Whether Over-Limit Fees Must Be Included In The Finance Charge.

The dispute in this case is not whether creditors must disclose over-limit fees to consumers. Creditors must disclose those fees, and it is undisputed that petitioners did so. The issue here is whether creditors must identify such over-limit fees as part of the "finance charge" or, instead, as "other charges." TILA is silent on that precise question.

TILA defines the term "finance charge" as "the sum of all charges" imposed by the creditor "as an incident to the extension of credit." 15 U.S.C. § 1605(a). This is a general, not a precise, definition. Congress recognized this imprecision and, accordingly, followed the definition with several illustrative examples of charges included in the finance charge. *See id.* § 1605(a)(1)-(6). With respect to some types of charges (*e.g.*, insurance premiums payable by the debtor), Congress also provided rules for determining inclusion or exclusion from the finance charge. *See id.* § 1605(a)-(c). And §1605 specifically exempts various other fees and charges from the finance charge. *See id.* § 1605(a), (d), (e). The fact

[6] This premise of the Court's *Milhollin* decision has held true in practice. Since TILA's enactment, the Board has undertaken numerous studies of consumer psychology and credit practices, making it particularly well-suited to identify those rules that best serve TILA's purpose of according consumers meaningful disclosure of the costs of credit. *See, e.g.*, Marianne A. Hilgert et al., *Household Financial Management: The Connection Between Knowledge and Behavior*, Fed. Reserve Bull. 309 (July 2003); Thomas A. Durkin, *Consumers and Credit Disclosures: Credit Cards and Credit Insurance*, Fed. Reserve Bull. 201 (Apr. 2002).

that the statute fleshes out its general definition by specifying over 15 additional rules for determining when certain types of charges must be included in the finance charge shows that Congress itself recognized the ambiguity of the general "finance charge" definition in § 1605(a).

None of these additional rules refers to over-limit fees. TILA does not state anywhere whether fees imposed on consumers for exceeding their credit limits must be included in the finance charge, or instead disclosed separately as other charges. TILA does make it clear, however, that not every charge imposed in connection with a credit plan must be included as part of the finance charge. With respect specifically to open-end consumer credit plans *(e.g.*, credit cards and charge cards), TILA requires creditors to disclose to consumers prior to the opening of any account not only "[t]he conditions under which a *finance charge* may be imposed" and "[t]he method of determining the amount of the *finance charge*," but also any "*other charges* which may be imposed as part of the plan, and their method of computation." 15 U.S.C. § 1637(a)(1), (3), (5) (emphases added). Although every charge to a credit card customer could be described in some sense as "an incident to the extension of credit," Congress clearly expected some charges to be treated as "other charges." The statute provides that creditors' disclosures of "other charges" shall take place "in accordance with regulations of the Board." *Id.* § 1637(a)(5).

TILA refers specifically to over-limit fees in only one context, and it illustrates the precise ambiguity at issue here. In 1988 Congress added new disclosure requirements to the statute to govern applications and solicitations for credit cards and charge cards. *See* 15 U.S.C. § 1637(c) (added by Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, § 2(a), 102 Stat. 2960). For purposes of these disclosures, TILA defines a "charge card" as "a card, plate, or other single credit device that may be used from time to time to obtain credit *which is not subject to a finance charge*." 15 U.S.C. § 1637(c)(4)(E) (emphasis added). Even though Congress thus recognized a charge

card account as one that does not have a "finance charge," it also expressly noted that there may be "[o]ver-the-limit fee[s]" on such accounts, and it required that solicitations and applications disclose such fees. *Id.* § 1637(c)(4)(B)(iii); *see also id.* § 1637(c)(1)(B)(iii) (parallel provision for credit cards). This treatment of over-limit fees as *not* constituting finance charges shows that Congress itself, in the same statute, thought the two could be treated as separate.

The general definition of "finance charge"—"the sum of all charges . . . imposed . . . as an incident to the extension of credit," 15 U.S.C. § 1605(a)—is also ambiguous with respect to the issue in this case in a more specific way. The statute defines "credit," in turn, as "*the right* granted by a creditor to a debtor to defer payment of debt or *to incur debt and defer its payment.*" *Id.* § 1602(e) (emphases added). An over-limit fee, however, is by definition not charged as a fee for exercising a "right" to incur debt and defer payment, but instead as a fee for having *breached the contractual limits* on the cardholder's right to do so. As Congress itself recognized, "over-the-limit fees . . . accrue for misuse of the account." S. Rep. No. 100-259, at 6 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3936, 3942. At the very least, the Board could rationally choose to classify over-limit fees as charges for breach of the borrowing agreement rather than for the exercise of a "right" to borrow.

III. The Board's Regulation Excluding Over-Limit Fees From The Finance Charge Is Not Demonstrably Irrational.

Because TILA does not specifically address whether over-limit fees must be included in the finance charge, the Board's Regulation Z fills this gap. It provides that "[c]harges for actual unanticipated late payment, *for exceeding a credit limit*, or for delinquency, default, or a similar occurrence" are not finance charges. 12 C.F.R. § 226.4(c)(2) (emphasis added). That regulatory classification is a rational implementation of the statute.

The Sixth Circuit agreed that the Board may properly treat other fees charged to consumers for breaches of their

credit card agreements—such as late payment and default fees—as "other charges" and exclude them from the finance charge. *See* Pet. App. A13-A14. The panel majority, however, believed that a transaction in which a credit card holder exceeds her credit limit may sometimes involve a "request" for "additional credit" that is "knowingly allowed" by the creditor (*id.* at A13), and concluded that TILA requires any charge imposed in such a case to be classified as a "finance charge." *See id.* at A9-A15.[7]

In ruling that the Board's "regulation cannot stand" (Pet. App. A12), the Sixth Circuit failed to accord a proper measure of deference to the Board's authority to implement disclosure requirements based on its experience and judgment in the consumer credit field. The Sixth Circuit substituted its own "liberal" interpretation of TILA for the reasonable construction selected by the Board. The Sixth Circuit's primary basis for its decision was its view that "TILA, as a remedial statute, must be given a liberal interpretation in favor of consumers in order to protect them in credit transactions." Pet. App. A8-A9; *see also id.* at A19 ("The district court erred in failing to construe TILA liberally in Plaintiff's favor . . . ."). In the Sixth Circuit's view, the inclusion of over-limit fees in the finance charge is necessitated by "TILA's statutory goal of providing adequate disclosure in order that the consumer will knowledgeably be able to compare credit options and 'avoid

[7] In using words such as "requested," "knowingly allowed," and "knowingly permits," the Sixth Circuit over-read the complaint, which does not allege that respondent asked petitioners for, or that petitioners agreed to give respondent, a right to exceed her credit limit. Respondent's own characterization of a credit card transaction as being "allowed" to proceed over a credit limit (Pet. App. A39) is merely a reference to the fact that credit cards are accepted as payment instruments by merchants who ordinarily obtain "authorization" from the credit card system. *See supra*, p. 14 n.4; *see also* Brief of Appellant in the Sixth Circuit at 14. In any event, the lawfulness of the Board's regulation and the deference due it from the Sixth Circuit do not properly depend on that court's assumptions about how the credit card system works.

the uninformed use of credit.'" *Id.* at A12 (quoting 15 U.S.C. § 1601(a)).

But Congress has made it clear that the Board, and not the courts, can best determine how to achieve the disclosure TILA seeks. As this Court has explained, "[t]he concept of meaningful disclosure that animates TILA cannot be applied in the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between competing considerations of complete disclosure and the need to avoid informational overload." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 568 (1980) (internal quotation marks, citations, and alterations omitted). Identifying the rule that achieves the appropriate balance in this disclosure context is "an empirical process that entails investigation into consumer psychology and that presupposes broad experience with credit practice." *Id.* at 568-69. For this reason, Congress delegated broad rulemaking power to the Board, the institution with such knowledge and experience. TILA evinces "a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." *Id.* at 568. The Sixth Circuit effectively ignored these well-established principles of deference in the TILA context by arrogating to itself the policy decision whether the inclusion of certain over-limit fees in the finance charge would best achieve TILA's purposes.

The Board has the authority to draw reasonable lines, not only as an incident of its general rulemaking power but also by virtue of its explicit statutory authority to create regulatory "classifications." 15 U.S.C. § 1604(a). For sound reasons, including TILA's goals of clarity for creditors and borrowers, the Board has excluded over-limit fees as a class from the "finance charge."

Congress amended TILA in 1980 to both "provide the consumer with clearer credit information, [and] make creditor compliance easier." S. Rep. No. 96-73, at 2 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280, 280. Heeding Congress's directions, the Board amended Regulation Z to serve these purposes.

First, the Board explained in its notice of proposed rulemaking that its amendments to Regulation Z would "substitute[], where possible, precise, easily-applied rules for principles that create ambiguity and require additional regulatory clarification." 45 Fed. Reg. 80648, 80648 (Dec. 5, 1980). The Board determined that "simplification [would] produce disclosures that [were] simpler, easier to understand, and in a form more readily useable by consumers." *Id.* *Second*, the Board revised Regulation Z to emphasize the disclosures most "relevant to credit decisions, as opposed to disclosures related to events occurring after the initial credit choice." *Id.* at 80649. As the Board explained, "the primary goals of the Truth in Lending Act are not particularly enhanced by regulatory provisions relating to changes in terms on outstanding obligations and on the effects of the failure to comply with the terms of the obligation." *Id.* *Third*, the Board determined not to impose regulatory requirements if they would "impose any burdens on the credit-granting process that [could not] be fully justified by consumer benefits." *Id.* The Board stated that its regulatory cost-benefit analysis turned on numerous factors, including "the complexity of the disclosures ... needed to comply with [a particular regulatory requirement], and the extent to which [the requirement] is likely to further the general statutory goals of providing certain basic information to facilitate credit shopping." *Id.*

The Board's express exclusion of over-limit fees from the finance charge followed from the Board's stated purposes with regard to the revision of Regulation Z generally. By applying a bright-line rule, the Board provided creditors a straightforward, easily-applied standard that could be applied in uniform, consistent, and meaningful disclosure statements for consumers.

No consumer interest required the Board to adopt instead an approach like that of the Sixth Circuit, which would treat identical over-limit charges sometimes as part of the "finance charge" and sometimes not depending on the facts surrounding a particular purchase and borrowing. On the contrary, because the treatment of an over-limit fee

under the Sixth Circuit's rule depends on the *creditor's* state of knowledge—and not the *cardholder's* behavior—the Sixth Circuit's rule would likely confuse cardholders by potentially requiring disparate disclosures of over-limit fees that were in all pertinent respects identically incurred.

This confusion is illustrated by the following hypothetical. Assume that a cardholder makes charges on two different credit cards (issued by two different creditors) in the same month, each of which causes the respective account to exceed its credit limit. Assume further that the first creditor knew at the time that the charge was made on its card that the transaction would cause the cardholder's account to exceed her credit limit, knew that it would impose an over-limit fee as a result of that transaction, and approved the charge. Finally, assume that the second creditor lacked knowledge that the charge on its card would take the cardholder over limit. If both creditors impose over-limit fees due to these charges, the Sixth Circuit rule would require different disclosure treatment for each over-limit fee. The first creditor would be required to include the over-limit fee in the disclosed finance charge and compute the annual percentage rate accordingly. The second creditor, however, would be required to exclude the over-limit fee from the finance charge and disclose it separately as an "other charge[]." From the perspective of the cardholder—who is unaware of the creditors' differing states of knowledge at the time the cardholder's charges were processed—the two situations are indistinguishable, yet her periodic billing statements look vastly different. With good reason, the cardholder would experience substantial confusion about her billing statements and the comparable costs of credit.

The Board's regulation, which instead provides for the uniform treatment of over-limit fees across creditors based on the actions of the *cardholder*, avoids this needless confusion without sacrificing any apparent consumer benefits. That regulatory choice surely cannot be termed "demonstrably irrational." *Milhollin*, 444 U.S. at 565.

The Board's classification of over-limit fees on a general basis as "other charges" also "facilitate[s] compliance" with TILA. 15 U.S.C. § 1604(a). The Sixth Circuit's rule, which turns on (among other things) the creditor's particular knowledge at the time it "permits" a cardholder's charges to be processed, would apparently require a creditor to create, maintain, and consult, new types of records containing all the account balance information available to it at the moment of every merchant authorization it gives for any transaction that may lead to an over-limit charge. As the Board explained in its proposed rulemaking in 1980, the imposition of such needless burdens on creditors ultimately disadvantages consumers—the intended beneficiaries of TILA. "[A]s a general matter regulatory burdens on the credit-granting process may adversely affect consumer access to credit, and certainly have a bearing on its relative costs. To the extent that these burdens can be reduced, there should be a beneficial effect on the availability and cost of credit." 45 Fed. Reg. at 80648. By facilitating creditors' compliance with TILA, the Board's exclusion of over-limit fees from the "finance charge" constitutes a rational and proper exercise of the Board's classification power.

Although the Sixth Circuit declined to consider it, the Board's amicus brief in that court explained many of the reasons why its classification of over-limit charges as "other charges" was a rational exercise of its judgment and discretion based on its expert knowledge of the credit system and consumer disclosures. *See* Pet. App. A47-A51. Credit card issuers generally cannot reliably determine, at the time a cardholder uses a credit card in a transaction, whether the charge will cause the account to exceed its credit limit and incur an over-limit charge. Accordingly, the Board has no reason to include such a knowledge element in its regulation concerning over-limit fees. Indeed, imposition of an approach like the one favored by the Sixth Circuit panel would render compliance more difficult for creditors, thereby upsetting a principal purpose of TILA, as amended by the Simplification Act. The Sixth Circuit's rule would require creditors to develop new and costly systems to

create, capture, and record new kinds of information about account status at the time of any transaction that might ultimately form the basis for an over-limit charge. The development of such new and complex systems would impose enormous costs on the credit card industry, with no apparent benefit to the affected cardholders. The Board's choice of an easily-applied, uniform regulation of over-limit fees instead of a rule requiring such burdensome compliance efforts is not demonstrably irrational, but instead falls well within the Board's power to utilize regulatory classifications "to facilitate compliance" with TILA. 15 U.S.C. § 1604(a).

CONCLUSION

Because petitioners complied with a lawful regulation, the judgment of the Sixth Circuit should be reversed and the district court's decision dismissing respondent's complaint for failure to state a claim should be reinstated.

Respectfully submitted,

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APPENDIX

15 U.S.C. § 1637

§ 1637. Open end consumer credit plans

(a) Required disclosures by creditor

Before opening any account under an open end consumer credit plan, the creditor shall disclose to the person to whom credit is to be extended each of the following items, to the extent applicable:

(1) The conditions under which a finance charge may be imposed, including the time period (if any) within which any credit extended may be repaid without incurring a finance charge, except that the creditor may, at his election and without disclosure, impose no such finance charge if payment is received after the termination of such time period. If no such time period is provided, the creditor shall disclose such fact.

(2) The method of determining the balance upon which a finance charge will be imposed.

(3) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge.

(4) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(5) Identification of other charges which may be imposed as part of the plan, and their method of computation, in accordance with regulations of the Board.

(6) In cases where the credit is or will be secured, a statement that a security interest has been or will be

taken in (A) the property purchased as part of the credit transaction, or (B) property not purchased as part of the credit transaction identified by item or type.

(7) A statement, in a form prescribed by regulations of the Board of the protection provided by sections 1666 and 1666i of this title to an obligor and the creditor's responsibilities under sections 1666a and 1666i of this title. With respect to one billing cycle per calendar year, at intervals of not less than six months or more than eighteen months, the creditor shall transmit such statement to each obligor to whom the creditor is required to transmit a statement pursuant to subsection (b) of this section for such billing cycle.

(8) In the case of any account under an open end consumer credit plan which provides for any extension of credit which is secured by the consumer's principal dwelling, any information which--

(A) is required to be disclosed under section 1637a(a) of this title; and

(B) the Board determines is not described in any other paragraph of this subsection.

(b) Statement required with each billing cycle

The creditor of any account under an open end consumer credit plan shall transmit to the obligor, for each billing cycle at the end of which there is an outstanding balance in that account or with respect to which a finance charge is imposed, a statement setting forth each of the following items to the extent applicable:

(1) The outstanding balance in the account at the beginning of the statement period.

(2) The amount and date of each extension of credit during the period, and a brief identification, on or accompanying the statement of each extension of credit in a form prescribed by the Board sufficient to enable the obligor either to identify the transaction or to relate it to [illegible] of sales vouchers or similar instruments

previously furnished, except that a creditor's failure to disclose such information in accordance with this paragraph shall not be deemed a failure to comply with this part or this subchapter if (A) the creditor maintains procedures reasonably adapted to procure and provide such information, and (B) the creditor responds to and treats any inquiry for clarification or documentation as a billing error and an erroneously billed amount under section 1666 of this title. In lieu of complying with the requirements of the previous sentence, in the case of any transaction in which the creditor and seller are the same person, as defined by the Board, and such person's open end credit plan has fewer than 15,000 accounts, the creditor may elect to provide only the amount and date of each extension of credit during the period and the seller's name and location where the transaction took place if (A) a brief identification of the transaction has been previously furnished, and (B) the creditor responds to and treats any inquiry for clarification or documentation as a billing error and an erroneously billed amount under section 1666 of this title.

(3) The total amount credited to the account during the period.

(4) The amount of any finance charge added to the account during the period, itemized to show the amounts, if any, due to the application of percentage rates and the amount, if any, imposed as a minimum or fixed charge.

(5) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and, unless the annual percentage rate (determined under section 1606(a)(2) of this title) is required to be disclosed pursuant to paragraph (6), the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(6) Where the total finance charge exceeds 50 cents for a monthly or longer billing cycle, or the pro rata part

of 50 cents for a billing cycle shorter than monthly, the total finance charge expressed as an annual percentage rate (determined under section 1606(a)(2) of this title), except that if the finance charge is the sum of two or more products of a rate times a portion of the balance, the creditor may, in lieu of disclosing a single rate for the total charge, disclose each such rate expressed as an annual percentage rate, and the part of the balance to which it is applicable.

(7) The balance on which the finance charge was computed and a statement of how the balance was determined. If the balance is determined without first deducting all credits during the period, that fact and the amount of such payments shall also be disclosed.

(8) The outstanding balance in the account at the end of the period.

(9) The date by which or the period (if any) within which, payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or the termination of such period.

(10) The address to be used by the creditor for the purpose of receiving billing inquiries from the obligor.

(c) Disclosure in credit and charge card applications and solicitations

(1) Direct mail applications and solicitations

(A) Information in tabular format

Any application to open a credit card account for any person under an open end consumer credit plan, or a solicitation to open such an account without requiring an application, that is mailed to consumers shall disclose the following information, subject to subsection (e) of this section and section 1632(c) of this title:

(i) Annual percentage rates

(I) Each annual percentage rate applicable to extensions of credit under such credit plan.

(II) Where an extension of credit is subject to a variable rate, the fact that the rate is variable, the annual percentage rate in effect at the time of the mailing, and how the rate is determined.

(III) Where more than one rate applies, the range of balances to which each rate applies.

(ii) Annual and other fees

(I) Any annual fee, other periodic fee, or membership fee imposed for the issuance or availability of a credit card, including any account maintenance fee or other charge imposed based on activity or inactivity for the account during the billing cycle.

(II) Any minimum finance charge imposed for each period during which any extension of credit which is subject to a finance charge is outstanding.

(III) Any transaction charge imposed in connection with use of the card to purchase goods or services.

(iii) Grace period

(I) The date by which or the period within which any credit extended under such credit plan for purchases of goods or services must be repaid to avoid incurring a finance charge, and, if no such period is offered, such fact shall be clearly stated.

(II) If the length of such "grace period" varies, the card issuer may disclose the range of days in the grace period, the minimum number of days in the grace period, or the average number of days in

the grace period, if the disclosure is identified as such.

(iv) Balance calculation method

(I) The name of the balance calculation method used in determining the balance on which the finance charge is computed if the method used has been defined by the Board, or a detailed explanation of the balance calculation method used if the method has not been so defined.

(II) In prescribing regulations to carry out this clause, the Board shall define and name not more than the 5 balance calculation methods determined by the Board to be the most commonly used methods.

(B) Other information

In addition to the information required to be disclosed under subparagraph (A), each application or solicitation to which such subparagraph applies shall disclose clearly and conspicuously the following information, subject to subsections (e) and (f) of this section:

(i) Cash advance fee

Any fee imposed for an extension of credit in the form of cash.

(ii) Late fee

Any fee imposed for a late payment.

(iii) Over-the-limit fee

Any fee imposed in connection with an extension of credit in excess of the amount of credit

authorized to be extended with respect to such account.

(2) Telephone solicitations

(A) In general

In any telephone solicitation to open a credit card account for any person under an open end consumer credit plan, the person making the solicitation shall orally disclose the information described in paragraph (1)(A).

(B) Exception

Subparagraph (A) shall not apply to any telephone solicitation if--

(i) the credit card issuer--

(I) does not impose any fee described in paragraph (1)(A)(ii)(I); or

(II) does not impose any fee in connection with telephone solicitations unless the consumer signifies acceptance by using the card;

(ii) the card issuer discloses clearly and conspicuously in writing the information described in paragraph (1) within 30 days after the consumer requests the card, but in no event later than the date of delivery of the card; and

(iii) the card issuer discloses clearly and conspicuously that the consumer is not obligated to accept the card or account and the consumer will not be obligated to pay any of the fees or charges disclosed unless the consumer elects to accept the card or account by using the card.

(3) Applications and solicitations by other means

(A) In general

Any application to open a credit card account for any person under an open end consumer credit plan, and any solicitation to open such an account without requiring an application, that is made available to the public or contained in catalogs, magazines, or other publications shall meet the disclosure requirements of subparagraph (B), (C), or (D).

(B) Specific information

An application or solicitation described in subparagraph (A) meets the requirement of this subparagraph if such application or solicitation contains--

(i) the information--

(I) described in paragraph (1)(A) in the form required under section 1632(c) of this title, subject to subsection (e) of this section, and

(II) described in paragraph (1)(B) in a clear and conspicuous form, subject to subsections (e) and (f) of this section;

(ii) a statement, in a conspicuous and prominent location on the application or solicitation, that--

(I) the information is accurate as of the date the application or solicitation was printed;

(II) the information contained in the application or solicitation is subject to change after such date; and

(III) the applicant should contact the creditor for information on any change in the information contained in the application or solicitation since it was printed;

(iii) a clear and conspicuous disclosure of the date the application or solicitation was printed; and

(iv) a disclosure, in a conspicuous and prominent location on the application or solicitation,

of a toll free telephone number or a mailing address at which the applicant may contact the creditor to obtain any change in the information provided in the application or solicitation since it was printed.

(C) General information without any specific term

An application or solicitation described in subparagraph (A) meets the requirement of this subparagraph if such application or solicitation--

(i) contains a statement, in a conspicuous and prominent location on the application or solicitation, that--

(I) there are costs associated with the use of credit cards; and

(II) the applicant may contact the creditor to request disclosure of specific information of such costs by calling a toll free telephone number or by writing to an address, specified in the application;

(ii) contains a disclosure, in a conspicuous and prominent location on the application or solicitation, of a toll free telephone number and a mailing address at which the applicant may contact the creditor to obtain such information; and

(iii) does not contain any of the items described in paragraph (1).

(D) Applications or solicitations containing subsection (a) disclosures

An application or solicitation meets the requirement of this subparagraph if it contains, or is accompanied by--

(i) the disclosures required by paragraphs (1) through (6) of subsection (a) of this section;

(ii) the disclosures required by subparagraphs (A) and (B) of paragraph (1) of this subsection

included clearly and conspiciously[1] (except that the provisions of section 1632(c) of this title shall not apply); and

(iii) a toll free telephone number or a mailing address at which the applicant may contact the creditor to obtain any change in the information provided.

(E) Prompt response to information requests

Upon receipt of a request for any of the information referred to in subparagraph (B), (C), or (D), the card issuer or the agent of such issuer shall promptly disclose all of the information described in paragraph (1).

(4) Charge card applications and solicitations

(A) In general

Any application or solicitation to open a charge card account shall disclose clearly and conspicuously the following information in the form required by section 1632(c) of this title, subject to subsection (e) of this section:

(i) Any annual fee, other periodic fee, or membership fee imposed for the issuance or availability of the charge card, including any account maintenance fee or other charge imposed based on activity or inactivity for the account during the billing cycle.

(ii) Any transaction charge imposed in connection with use of the card to purchase goods or services.

(iii) A statement that charges incurred by use of the charge card are due and payable upon receipt

[1] So in original. Probably should be "conspicuously".

of a periodic statement rendered for such charge card account.

(B) Other information

In addition to the information required to be disclosed under subparagraph (A), each written application or solicitation to which such subparagraph applies shall disclose clearly and conspicuously the following information, subject to subsections (e) and (f) of this section:

(i) Cash advance fee

Any fee imposed for an extension of credit in the form of cash.

(ii) Late fee

Any fee imposed for a late payment.

(iii) Over-the-limit fee

Any fee imposed in connection with an extension of credit in excess of the amount of credit authorized to be extended with respect to such account.

(C) Applications and solicitations by other means

Any application to open a charge card account, and any solicitation to open such an account without requiring an application, that is made available to the public or contained in catalogs, magazines, or other publications shall contain--

(i) the information--

(I) described in subparagraph (A) in the form required under section 1632(c) of this title, subject to subsection (e) of this section, and

(II) described in subparagraph (B) in a clear and conspicuous form, subject to subsections (e) and (f) of this section;

(ii) a statement, in a conspicuous and prominent location on the application or solicitation, that--

(I) the information is accurate as of the date the application or solicitation was printed;

(II) the information contained in the application or solicitation is subject to change after such date; and

(III) the applicant should contact the creditor for information on any change in the information contained in the application or solicitation since it was printed;

(iii) a clear and conspicuous disclosure of the date the application or solicitation was printed; and

(iv) a disclosure, in a conspicuous and prominent location on the application or solicitation, of a toll free telephone number or a mailing address at which the applicant may contact the creditor to obtain any change in the information provided in the application or solicitation since it was printed.

(D) Issuers of charge cards which provide access to open end consumer credit plans

If a charge card permits the card holder to receive an extension of credit under an open end consumer credit plan, which is not maintained by the charge card issuer, the charge card issuer may provide the information described in subparagraphs (A) and (B) in the form required by such subparagraphs in lieu of the information required to be provided under paragraph (1), (2), or (3) with respect to any credit extended under such plan, if the charge card issuer discloses clearly and conspicuously to the consumer in the application or solicitation that--

(i) the charge card issuer will make an independent decision as to whether to issue the card;

(ii) the charge card may arrive before the decision is made with respect to an extension of credit under an open end consumer credit plan; and

(iii) approval by the charge card issuer does not constitute approval by the issuer of the extension of credit.

The information required to be disclosed under paragraph (1) shall be provided to the charge card holder by the creditor which maintains such open end consumer credit plan before the first extension of credit under such plan.

(E) Charge card defined

For the purposes of this subsection, the term "charge card" means a card, plate, or other single credit device that may be used from time to time to obtain credit which is not subject to a finance charge.

(5) Regulatory authority of the Board

The Board may, by regulation, require the disclosure of information in addition to that otherwise required by this subsection or subsection (d) of this section, and modify any disclosure of information required by this subsection or subsection (d) of this section, in any application to open a credit card account for any person under an open end consumer credit plan or any application to open a charge card account for any person, or a solicitation to open any such account without requiring an application, if the Board determines that such action is necessary to carry out the purposes of, or prevent evasions of, any paragraph of this subsection.

(d) Disclosure prior to renewal

(1) In general

Except as provided in paragraph (2), a card issuer that imposes any fee described in subsection (c)(1)(A)(ii)(I) or (c)(4)(A)(i) of this section shall transmit to a consumer at least 30 days prior to the scheduled renewal date of the consumer's credit or charge card account a clear and conspicuous disclosure of--

(A) the date by which, the month by which, or the billing period at the close of which, the account will expire if not renewed;

(B) the information described in subsection (c)(1)(A) or (c)(4)(A) of this section that would apply if the account were renewed, subject to subsection (e) of this section; and

(C) the method by which the consumer may terminate continued credit availability under the account.

(2) Special rule for certain disclosures

(A) In general

The disclosures required by this subsection may be provided--

(i) prior to posting a fee described in subsection (c)(1)(A)(ii)(I) or (c)(4)(A)(i) of this section to the account, or

(ii) with the periodic billing statement first disclosing that the fee has been posted to the account.

(B) Limitation on use of special rule

Disclosures may be provided under subparagraph (A) only if--

(i) the consumer is given a 30-day period to avoid payment of the fee or to have the fee

recredited to the account in any case where the consumer does not wish to continue the availability of the credit; and

(ii) the consumer is permitted to use the card during such period without incurring an obligation to pay such fee.

(3) Short-term renewals

The Board may by regulation provide for fewer disclosures than are required by paragraph (1) in the case of an account which is renewable for a period of less than 6 months.

(e) Other rules for disclosures under subsections (c) and (d)

(1) Fees determined on the basis of a percentage

If the amount of any fee required to be disclosed under subsection (c) or (d) of this section is determined on the basis of a percentage of another amount, the percentage used in making such determination and the identification of the amount against which such percentage is applied shall be disclosed in lieu of the amount of such fee.

(2) Disclosure only of fees actually imposed

If a credit or charge card issuer does not impose any fee required to be disclosed under any provision of subsection (c) or (d) of this section, such provision shall not apply with respect to such issuer.

(f) Disclosure of range of certain fees which vary by State allowed

If the amount of any fee required to be disclosed by a credit or charge card issuer under paragraph (1)(B), (3)(B)(i)(II), (4)(B), or (4)(C)(i)(II) of subsection (c) of this section varies from State to State, the card issuer may

disclose the range of such fees for purposes of subsection (c) of this section in lieu of the amount for each applicable State, if such disclosure includes a statement that the amount of such fee varies from State to State.

(g) Insurance in connection with certain open end credit card plans

(1) Change in insurance carrier

Whenever a card issuer that offers any guarantee or insurance for repayment of all or part of the outstanding balance of an open end credit card plan proposes to change the person providing that guarantee or insurance, the card issuer shall send each insured consumer written notice of the proposed change not less than 30 days prior to the change, including notice of any increase in the rate or substantial decrease in coverage or service which will result from such change. Such notice may be included on or with the monthly statement provided to the consumer prior to the month in which the proposed change would take effect.

(2) Notice of new insurance coverage

In any case in which a proposed change described in paragraph (1) occurs, the insured consumer shall be given the name and address of the new guarantor or insurer and a copy of the policy or group certificate containing the basic terms and conditions, including the premium rate to be charged.

(3) Right to discontinue guarantee or insurance

The notices required under paragraphs (1) and (2) shall each include a statement that the consumer has the option to discontinue the insurance or guarantee.

(4) No preemption of State law

No provision of this subsection shall be construed as superseding any provision of State law which is applicable to the regulation of insurance.

(5) Board definition of substantial decrease in coverage or service

The Board shall define, in regulations, what constitutes a "substantial decrease in coverage or service" for purposes of paragraph (1).